Filed 12/29/09 P. v. Fawcett CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A122969**

v. **(Contra Costa County Super. Ct. No. 050804971)**

SHARON LEE FAWCETT,

Defendant and Appellant.

_____/

Sharon Lee Fawcett appeals from a judgment entered after a jury convicted her of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), driving on a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)), and driving without a current license. (Veh. Code, § 12500, subd. (a).) She contends (1) the trial court erred when it ruled she was not eligible for Proposition 36 probation, (2) the court abused its discretion when it prevented her from presenting a complete defense, (3) the evidence was insufficient to support the transportation count, (4) the court erred when it denied her motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, (5) the court erred when it denied her motion for a new trial, (6) the court erred when it ordered her to pay attorney fees, and (7) she received ineffective assistance of counsel. We reject these arguments and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2007, shortly before 10:30 p.m., Deputy Howard Shiells of the Contra Costa County Sheriff's Department was on patrol when he saw a white, 90's model Oldsmobile run a red light. Shiells initiated a traffic stop. The driver, appellant, and two others, Dwayne Taylor and Patty Viscio, were inside. Appellant told Shiells she did not realize she had gone through a red light. She gave Shiells her driver's license and told him it had been suspended. Shiells arrested appellant and put her in his patrol car.

Appellant said she did not have anything illegal in her car. She consented to a search. Shiells searched the vehicle and found a coin purse under a laundry basket that was on the backseat. Inside the purse, Shiells found two straws, 25 plastic bags, five $20 bills, and 6.43 grams of methamphetamine.

Shiells showed the coin purse and its contents to appellant. She denied knowing anything about it and suggested her uncle must have left it there. When Shiells said he might have to arrest both appellant and Viscio because he could not determine who owned the coin purse, appellant admitted it was hers. Appellant said she had gotten the drugs for her uncle and that she was bringing them to his house.

Based on these facts, an information was filed charging appellant with transporting methamphetamine, driving on a suspended or revoked license, and driving without a current license.

The case proceeded to a jury trial where the prosecution presented the evidence we have set forth above. Appellant testified in her own defense. She said the car she was driving belonged to her boyfriend Pedro Lajuga. That morning, Lajuga had dropped her off at a friend's house so she could do some laundry. Viscio and Taylor were also in the car. When Lajuga returned about 10 hours later, Viscio and Taylor were still in the car. Appellant was angry about being left so long, and she did not like Viscio and Taylor. However, hoping to avoid a confrontation, appellant jumped in the car and drove off, taking Viscio and Taylor with her. Appellant tossed her laundry basket in the backseat and started to drive toward her uncle's house.

Appellant admitted she told Shiells the coin purse was hers, although she claimed it was a sarcastic remark that she made in response to a comment Shiells made about her uncle carrying a purse. Appellant said, "something to the effect that, yeah, the dope is mine. The money is mine. Everything is mine. I am going to . . . my uncle's to drop it [off] right now and his purse too, something to that effect."

The jurors evaluating this evidence convicted appellant on all three counts. Subsequently, the court declined to offer appellant Proposition 36 probation, but placed her on formal probation instead.

II. DISCUSSION

A. Proposition 36 Probation

Appellant contends the trial court erred when it declined to offer her Proposition 36 probation.

Under Proposition 36 a defendant who has been convicted of a "'nonviolent drug possession offense'" must receive probation and diversion into a drug treatment program. (*People v. Canty* (2004) 32 Cal.4th 1266, 1272.) However, certain defendants are excluded from diversion and treatment under Proposition 36. As is relevant here, among those excluded are "Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs . . . ." (Pen. Code, § 1210.1, subd. (b)(2).) Here, in addition to being convicted of transporting methamphetamine, appellant was convicted in the same proceeding of driving on a suspended license (Veh. Code, § 14601.1, subd. (a)), and driving without a current license (Veh. Code, § 12500, subd. (a)). Neither offense is related to the use of drugs and both convictions disqualified appellant from Proposition 36 probation. (Pen. Code, § 1210.1, subd. (b)(2).)

Furthermore, only certain defendants are eligible for diversion and treatment under Proposition 36. As is relevant here, among those eligible are those who are convicted of "transportation for personal use of any controlled substance . . . ." (Pen. Code, § 1210, subd. (a).) The defendant, rather than the prosecution bears the burden of proving that the drugs at issue were transported for personal use. (*People v. Barasa* (2002) 103

Cal.App.4th 287, 296; *People v. Dove* (2004) 124 Cal.App.4th 1, 10.) The trial court must determine whether drugs were transported for personal use and its ruling will be affirmed on appeal if it is supported by substantial evidence. (*Dove*, *supra*, at p. 10.)

Here, the trial court specifically declined to rule that the drugs appellant transported were for personal use. The court's ruling is supported by substantial evidence. As the court noted, the car appellant was driving contained nearly a quarter ounce of methamphetamine. The purse in which the methamphetamine was found also contained numerous unused bags and five $20 bills. Based on this evidence, the trial court reasonably could conclude appellant's transportation was not for personal use.

We conclude appellant was not eligible for Proposition 36 probation both because she was excluded, and because there was substantial evidence that she was not statutorily eligible.

B. Whether the Court Prevented Appellant from Presenting a Complete Defense

As we have noted, Duane Taylor and Patty Viscio were with appellant on the night of her arrest. Both told Deputy Shiells that the drugs found in the car belonged to appellant. Indeed, Viscio said appellant gave her the drugs and told her to hide them just before Shiells contacted them.

At the beginning of trial, the prosecutor filed a motion in limine to exclude any mention of the fact that Viscio was arrested and subsequently convicted should Viscio *not* testify at trial. The court's ruling on that motion was not reported, but subsequent discussion on the record indicates the motion was granted.

Neither the prosecutor nor defense counsel called Taylor or Viscio as a witness at trial, a situation that defense counsel believed *benefited* appellant significantly. As counsel explained, "In terms of calling Ms. Viscio, Ms. Viscio would not have helped Ms. Fawcett. She made a statement to the police as did [Mr. Taylor] at the time of the traffic stop very much incriminating Ms. Fawcett. [¶] From a defense standpoint, I was quite pleased that they were not called as Prosecution witnesses. And I was not going to myself help convict Ms. Fawcett by bringing these people in to testify."

After appellant was convicted, and at the sentencing hearing, appellant filed a pro per motion for new trial. As part of that motion, appellant complained about the fact that "she was not allowed to bring in any evidence of the female passenger and the fact that drugs were found in the female passenger's purse." Defense counsel suggested that appellant was precluded from presenting that evidence by the court's ruling on the People's in limine motion. The court said it didn't recall excluding evidence that Viscio had drugs or drug paraphernalia on her person or in her possession. As for the People's in limine motion, it "basically is a correct statement of the law in terms of the law of unjoined perpetrators that somebody else may have been involved in the commission of this offense and the jury is not to be concerned about that and not speculate whether the person will be prosecuted or has been prosecuted or the outcome of that case. [¶] It has nothing to do with excluding evidence of methamphetamine and [the] meth pipe found or associated with Ms. Viscio."

Appellant now contends "the court erred in limiting her ability to fully explore Viscio's involvement in the crime, and thus to present a complete defense." We reject this argument because it is based on a false premise. The trial court *did not* prevent appellant from exploring whether the drugs that were found may have belonged to Viscio. Rather, it appears that *defense counsel* decided, as a tactical matter not to call Viscio as a witness because of the negative evidence she could provide. We see no error on this ground.

Appellant argues that if her argument on this point is foreclosed, then she received ineffective assistance of counsel. According to appellant, the issue of who possessed the drugs, "should have been vigorously contested . . . ."

A defendant who contends she received ineffective assistance has the burden of proving that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness when measured by prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

Here, defense counsel forthrightly explained why she did not want to call Taylor and Viscio as witnesses: both had made statements that were highly incriminating for appellant. Defense counsel's tactical decision not to call either as a witness was reasonable and certainly did not constitute ineffective assistance.

C. Sufficiency of the Evidence

Appellant contends her conviction for transporting methamphetamine must be reversed because the prosecution failed to prove the corpus delicti of a transportation offense independent of her own statements.

"In any criminal prosecution, the corpus delicti must be established by the prosecution independently from the extrajudicial statements, confessions or admissions of the defendant." (*People v. Diaz* (1992) 3 Cal.4th 495, 528-529.) The purpose of the rule is "to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator." (*People v. Cullen* (1951) 37 Cal.2d 614, 625.)

Here, appellant contends the evidence was insufficient because other than the comments she made to Deputy Shiells, there was no evidence that she knew there was methamphetamine in the backseat of her car.

The corpus delicti of a crime may be proved by circumstantial evidence and it need not be beyond a reasonable doubt. (*People v. Diaz, supra,* 3 Cal.4th at p. 529.) A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. (*Ibid.*)

Here, appellant was driving a car in which methamphetamine was found. The coin purse in which the methamphetamine was found was hidden under a laundry basket that appellant herself had placed in the car. These factors together supported a reasonable inference that appellant knew she was transporting methamphetamine. The evidence was sufficient.

D. *Marsden*

Shortly after the trial began, appellant expressed dissatisfaction with her appointed trial counsel, Terri Mockler. The trial court conducted a hearing to explore the reasons

for appellant's dissatisfaction. She described them at length. After hearing Mockler's response, the court denied the motion ruling there was no reason to replace her. Appellant now contends the trial court abused its discretion when it denied her request for new counsel.

"'"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of [her] contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 681, disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We review a trial court's ruling on a *Marsden* motion for abuse of discretion. (*Roldan, supra,* at p. 681.)

Here, appellant contends there are several reasons why the court should have provided her with new counsel. First, appellant argues trial counsel was inadequate because she refused to provide her with a copy of the preliminary hearing transcript. The record indicates appellant was present at the preliminary hearing and that only one witness testified. Appellant said she fully understood what happened at the preliminary hearing. While counsel apparently declined to provide appellant with her copy of the transcript, the *trial court* offered to loan appellant its copy. We conclude the trial court did not abuse its discretion when it declined to appoint new counsel as a result of this relatively minor dispute.

Next, appellant argues new counsel was required because the *trial court* was not impartial. It is difficult to see the connection between an alleged lack of impartiality on the part of the trial court and the need for new counsel. However, we need not try to sort it out because appellant's argument is based on a false premise. Appellant contends the trial court was not impartial because in response to appellant's statements of concern about the adequacy of counsel, the court commented that Mockler was "a very

experienced attorney" and that the court had "full faith and confidence" in her trial abilities. We do not view these comments as evidencing a lack of impartiality. We view them as the acts of a careful and compassionate trial judge trying to help a relatively inexperienced litigant through the difficult criminal trial process. Appellant also contends the trial court was not impartial because it speculated that one reason Mockler may have been uncomfortable providing appellant with a copy of the preliminary hearing transcript was that the transcript belongs to the reporter and counsel may not have been comfortable making a copy without asking the reporter. Again, we do not view this as partiality. The court simply made a reasonable assumption based on the applicable statutes. (See Gov. Code, § 69950.) We see no error on this ground. Finally, appellant contends the court's lack of impartiality is illustrated by "the fact that it indicated it would deny the *Marsden* motion before Mockler put her reasoning on the record." This is incorrect. After appellant had thoroughly aired her complaints, the court did state that nothing appellant had said would "cause me yet to relieve Ms. Mockler as the trial attorney of record." However, the court was simply evaluating the complaints appellant had made. The court did not make a final ruling denying the motion. We see no impartiality.

Next, appellant argues new counsel was required because the trial court and counsel both "belittled" appellant. Specifically, appellant faults counsel for telling her "'you just don't get it,'" for describing as a "fiction" appellant's statement that counsel never contacted her, and for counsel telling the court that she had talked to appellant "'nine times about this case . . . .'" Appellant faults the court for telling her the preliminary transcript problem was "not a major issue" and for telling appellant to "be quiet" and not interrupt others in court. Again, we reject appellant's argument because it is based on a false premise. The record indicates appellant was not legally sophisticated and that she was unfamiliar with many of the proceedings that were occurring. The record also indicates that the court and counsel may occasionally have become frustrated with appellant due to her frequent outbursts in court and her inability to understand the different roles and responsibilities of the court and counsel. However, read in context,

the comments we have quoted are relatively mild and they do not indicate that either the court or counsel were belittling appellant.

Finally, appellant faults the court for trying to explain to her the reasons why her counsel was making certain tactical decisions. We conclude the trial court's efforts to explain the sometimes bewildering criminal process to a relatively inexperienced criminal defendant do not indicate that new trial counsel was required.

In sum, we conclude the trial court did not abuse its discretion when it denied appellant's request for new counsel.

E. New Trial

As we have stated, at the sentencing hearing, appellant, acting in pro per, asked the court to grant her a new trial. The trial court interpreted appellant's request as a motion for new trial based on ineffective assistance of trial counsel. After discussing the request at length, the court denied the motion ruling counsel had not been ineffective. Appellant now contends the trial court erred when it denied her motion for new trial based on ineffective assistance.

We reiterate the standard of review. A defendant who contends she received ineffective assistance has the burden of proving that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness when measured by prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.) Applying that standard, we conclude the trial court correctly denied appellant's motion.

First, appellant contends the trial counsel was ineffective because she misunderstood the court's in limine ruling. Specifically, appellant contends trial counsel misinterpreted the court's ruling on the prosecution's in limine ruling as preventing her from presenting evidence as to whether Viscio may have possessed drugs or drug paraphernalia. While there is some indication in the record that counsel may in fact have misinterpreted the court's in limine ruling, that is of no moment. Counsel also made clear that as a tactical matter, she did not intend to call Viscio as a witness because Viscio

had told Deputy Shiells that appellant gave her the drugs and told her to hide them. Thus, even if counsel may have been mistaken about the court's ruling, the ultimate effect was the same. Viscio would not be called. We see no possibility for prejudice.

Next, appellant faults defense counsel for failing to impeach Deputy Shiells with a photograph that showed the car appellant was driving had four doors not two as Shiells had testified at trial. However, even if we were to assume that reasonably competent counsel would have impeached Shiells with the photograph, the point was minor. It is not reasonably probable appellant would have achieved a more favorable result but for counsel's error.

Finally, appellant contends trial counsel was ineffective because she failed to call the other passenger, Taylor as a witness or make any attempt to preserve his testimony.[1] However again, the reason why counsel did not want to call Taylor as a witness (or presumably present his previously preserved testimony) was clear. As a tactical matter, counsel believed Taylor would prove more harmful than beneficial because he too had told Deputy Shiells that the drugs in question belonged to appellant. Counsel's tactical decision on this point was reasonable and did not constitute ineffective assistance.

Since there was no ineffective assistance, we conclude the court did not err when it denied appellant's motion for new trial.

F. Attorney Fees

"Subdivision (b) of section 987.8 of the Penal Code . . . provides that, upon the conclusion of criminal proceedings in the trial court, the court may, after giving the defendant notice and a hearing, make a determination of his present ability to pay all or a portion of the cost of the legal assistance provided him." (*People v. Flores* (2003) 30 Cal.4th 1059, 1061, fn. omitted.) Section 987.8, subdivision (b), also states that the court "'may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.'" (*Flores, supra,* at p. 1063.)

---

[1] Appellant stated that Taylor was terminally ill at the time of trial.

The latter procedure was followed in this case. At the conclusion of the sentencing hearing, the court assessed appellant $500 for the services she had received. The court then went on to explain, "that is actually the standard amount that we assess whether it is [a] misdemeanor trial or felony trial. You have been represented by the Public Defender throughout these proceedings, throughout the preliminary hearing, throughout the trial, and while you may disagree with some of the aspects of Ms. Mockler's representation and disagree with the finding of the jury, I believe it is appropriate to assess the $500 in this case. [¶] Again, this is not terms and conditions of probation. It is a separate matter. [¶] You have the right to contest the amount assessed and right to contest your ability to make the amount assessed, so you will be given the explanation of that. If you wish to contest the amount assessed or your ability to make payment on that, you have to follow through, contact the Office of Revenue Collections within 20 working days of today's date. It will be written out for you. [¶] . . . [T]he Office of Revenue Collections has the right to meet with you and confer with you and have a hearing and make some determination in that regard. [¶] If you go through that process . . . [and] are dissatisfied with the outcome of that process, I believe you retain the right to have a judicial review of [ ] -- your ability to make payments on the amount assessed. And if you want to do that, if you go through the hearing and are dissatisfied with the outcome . . . you need to get the matter brought back before the Court on that issue."

Appellant now challenges the $500 fee assessment on several grounds. She claims the record does not contain any evidence that she was told she might have to pay for the attorney services she received. She contends the court erred when it assessed $500 as a "standard amount." Appellant also argues that because she is poor, the court could not validly order her to pay any fees.

Appellant did not raise any of these arguments in the court below. She has forfeited the right to raise them in this court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Anticipating we might reach this conclusion, appellant argues trial counsel was constitutionally ineffective because she failed to challenge the $500 fee assessment. We

are unpersuaded. While there is no evidence in the record that appellant was told she might have to pay attorney fees, it is entirely possible that trial counsel told appellant that might happen. On appeal, we must presume that is the case. (*People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Even if we were to assume the court erred in assessing $500 as a "standard amount," our review of the record indicates appellant received attorney services that were worth far more than that. It is not reasonably probable appellant would have received a more favorable result absent the error alleged. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.) As for the claim that appellant should not pay any fees because she is poor, counsel may simply have decided that appellant could and should raise that issue to the Office of Revenue Collections as the court indicated. We cannot conclude that such a decision would have been unreasonable.

We conclude counsel was not ineffective.

G. Ineffective Assistance

Appellant contends trial counsel provided her with ineffective assistance. Her specific arguments on this point are a restatement of the same arguments we have addressed and rejected above. We reject the arguments in this context as well.

III. DISPOSITION

The judgment is affirmed.

_____

Jones, P.J.

We concur:

_____

Simons, J.

_____

Needham, J.